No. 12340

In The

United States Court of Appeals

For the Ninth Circuit

BOOTH-KELLY LUMBER COMPANY, a Corporation,
Appellant,
vs.
SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee,
and
SOUTHERN PACIFIC COMPANY, a Corporation,
Appellant,
vs.
BOOTH-KELLY LUMBER COMPANY, a Corporation,
Appellee.

Combined Brief of Cross-Appellee and Appellant Booth-Kelly Lumber Company

BRIEF OF CROSS-APPELLEE

Appeal and Cross-Appeal from the United States District Court for the District of Oregon.

HONORABLE JAMES ALGER FEE, *Judge*

KOERNER, YOUNG, SWETT & MCCULLOCH,
JAMES C. DEZENDORF,
ALFRED H. CORBETT,
800 Pacific Building, Portland, Oregon,
Attorneys for Appellee.

VEAZIE, POWERS & VEAZIE, and
JAMES ARTHUR POWERS,
622 Lumberman's Building, Portland, Oregon,
Attorneys for Appellant.

SUBJECT INDEX

SUBJECT INDEX—Continued

TABLE OF CASES

TABLE OF CASES—Continued

STATUTES

MISCELLANEOUS

No. 12340

In The
United States Court of Appeals
For the Ninth Circuit

BOOTH-KELLY LUMBER COMPANY, a Corporation, *Appellant*,
vs.
SOUTHERN PACIFIC COMPANY, a Corporation, *Appellee*,
and
SOUTHERN PACIFIC COMPANY, a Corporation, *Appellant*,
vs.
BOOTH-KELLY LUMBER COMPANY, a Corporation, *Appellee.*

Combined Brief of Cross-Appellee and Appellant Booth-Kelly Lumber Company

---

BRIEF OF CROSS-APPELLEE

Appeal and Cross-Appeal from the United States District Court for the District of Oregon.

HONORABLE JAMES ALGER FEE, Judge.

(Appellant in this cross-appeal is referred to herein as "Southern Pacific" or "railroad" and appellee is referred to as "Booth-Kelly.")

ANSWER TO THE SOUTHERN PACIFIC'S SPECIFICATION OF ERROR NO. 1

SUMMARY OF ARGUMENT

POINT ONE: There was no breach of Section 5 of the industrial track agreement relating to clearances.

POINT TWO: The Oregon statutes as to spur track service are controlling in this case, and since they require the service provided for by the spur track agreement there was no consideration for such contract.

POINT THREE: The cause of the injury was not any allegedly impaired clearance but the railroad's subsequent intervening independent negligence in failing to warn its employee and in continuing operation on the obstructed track.

POINT FOUR: If there was a breach, the Southern Pacific can claim no benefit thereby since it had waived any breach and was in any case estopped by its failure to conform to the custom which had grown up regarding the removal of obstructions.

POINT FIVE: Since the contract contained several express indemnity clauses, the railroad cannot recover indemnity based on any implied contract of indemnity for breach since no clause can be implied when the parties have expressly contracted on the matter nor will such a contract be construed to cover the railroad's own negligence.

POINT SIX: A breach, if any, of the agreement as to clearances would not in any event give rise to a cause of action for any damages resulting therefrom since Section 9 of the agreement expressly provides that railroad shall have a right to discontinue service in that event.

POINT SEVEN: The agreement gave the railroad full control of the track and therefore the railroad had the right to remove a cart left near the track if it was dangerous to operations thereon, irrespective of the ownership of the obstruction.

POINT EIGHT: Since the railroad seeks damages for an alleged breach of contract, the proper measure of such damages is not tort damages or costs to which the railroad was subjected to for its own independent act of negligence.

ARGUMENT

The Southern Pacific contends that there was a breach of the impaired clearance provisions of the industrial spur track agreement. At page 69 of Booth-Kelly's opening brief, Booth-Kelly has specified as error two of three Findings of Fact relied on by the Southern Pacific under its present Specification of Error. (No. 21, 13) (T 53-54). In support of Booth-Kelly's specification of error referred to, it was argued that: "there was no

breach of the spur track contract relating to clearance." (Brief 70-72) That argument is still relied on to meet the contention of the Southern Pacific here that there was no breach. Essentially there was no breach because a moveable lumber cart was not covered by impaired clearance language which related to fixed obstructions like pipes or poles.

The Southern Pacific next states that as a common carrier it was not compelled under the Interstate Commerce Act to render service to Booth-Kelly over the industrial spur, citing 49 U.S.C.A. Sec. 1 (9). Its title is *Switch connections and tracks*, and it provides that under certain conditions a carrier subject to the act must construct and operate switch connections with side tracks. (Section 1 (9) is set out in the Southern Pacific's Brief at page 36.)

That section should be compared with 49 U.S.C.A. 1 (22) *Construction, Etc., of Spurs, Switches, Etc., within State:*

> "The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, * * *"

Section 1 (9) is not in point here because it refers to the provision of a *switch connection* to a railroad line

and not with the provision of *spur track service*. For example, under this section a railroad cannot be ordered to build a switch connection with shipper's side track until after the shipper has built such side track. *Cleveland, C.C. & St. L. Ry. Co. v. U.S.*, 275 U.S. 404, 413, 72 L. Ed. 338, 48 S. Ct. 189.

A quotation from the Cleveland case, supra, makes clear the relationship of the two sections:

> "In denying their application to side tracks or spurs, paragraph 22 refers to tracks built by the carrier as part of its railroad. (Citation) Paragraph 9, on the other hand, relates to switch connections with private sidings built by the shipper." (P. 408)

Here the Southern Pacific did build the spur in question. Section 13 of the spur track agreement provides that the railroad at its own expense will maintain the track (T 17); by Section 8 it may rearrange, reconstruct, or modify the elevation of the track (T 12); and Section 4 provides that: "* * * said Track shall be under control of Railroad and Railroad shall have right to use same when not to the detriment of the Industry." (T 8) All these facts make it clear that the spur was built and operated as part of the railroad; it was not simply a question of a connection.

Therefore, 49 U.S.C.A. 1 Sec. (22) is controlling here. Since it is controlling, *Luton Mining Co. v. Louisville N. R. Co.*, 276 Ky. 321, 123 S.W. (2d) 1055, inter-

preting Section 1 (9) is not in point here. On pages 38 through 51 of Booth-Kelly's opering brief, Section 1 (22) is analyzed and Oregon statutes cited which show that spur track service is compulsory and therefore no consideration existed for any contract with the Southern Pacific as to indemnity. Secondly, there was no consideration because the indemnity section was inserted in the Revised Spur Track Agreement without new consideration after long operation under contracts having no such clause. (Opening brief 51-53).

To summarize, Booth-Kelly denies liability for breach of the clearance provisions of the industrial spur track agreement because: (1) there was no breach; (2) there was no valid contract since no consideration moved to Booth-Kelly; and (3) the cause of the injury was not the proximity of the cart to the track since the railroad's subsequent intervening independent negligence, namely, a failure to warn and continuation of operations on an obstructed track, was the proximate cause. That argument is set out in detail at pages 72 to 76 of Booth-Kelly's opening brief in support of the following point: "If there was a breach, appellee's loss did not result from the alleged breach." (See also Booth-Kelly's opening brief: pages 32-34; pages 29-32.)

A fourth reason the Southern Pacific can not recover is that assuming *arguendo* there was a breach, the rail-

road waived any breach and hence cannot now claim damages. The court below found that the railroad's employees observed the position of the cart and operations continued thereafter prior to the accident. (T 54) The argument is made in detail in Booth-Kelly's opening brief (p.p. 76-77). Finally, the Southern Pacific cannot recover for any breach of the contract because it is estopped by reason of its failure to conform to a custom which had grown up governing the removal of obstructions. (Opening brief pp. 77-79).

Other reasons exist for denying recovery for breach of contract. Here the contract contained several express indemnity clauses: Sections 7 and 18. (T. 11, 19). If indemnity is sought for breach of contract they must control because they represent the express contract of the parties on this matter. No contract can be implied to cover matters on which the parties have expressly contracted. *Failing v. Osborne*, 3 Or. 498. Therefore, an attempt to recover for breach of contract without invoking the indemnity clauses contained in that contract must fail. Recovery on an implied contract of indemnity is especially difficult since the court below concluded as a matter of law that Booth-Kelly was not obliged to pay the railroad $44,568.99 or any part thereof, *independent of the spur track agreement.* (Conclusion No. 5, T. 55).

Even if the railroad could rely on an implied indemnity contract, such a contract will not be construed to cover its own negligence. *U. S. Fid. & Guar. Co. v. Thomlinson Co.*, 172 Or. 307, 324, 141 P. 2d 817. Here the railroad was found negligent. (Finding of Fact No. 14, T. 54). Nor will contribution allow the railroad recovery here. First, it sues for breach of contract not for sharing tort damage. Second, there is no contribution between tortfeasors in Oregon. *Fidelity & Casualty Co. v. Chapman*, 167 Or. 661, 120 P. 2d 223.

Another reason exists against implying a contract of indemnity: Section 9 provides a specific remedy for any alleged obstruction of the track. (T. 13). That section allows the railroad to discontinue service in such case. Since the contract has set out the specific remedy, it must be deemed exclusive, and therefore no cause of action for damages can accrue. To hold otherwise would be to allow the railroad to create a cause of action by its own failure to exercise its contractual remedy where as here the railroad knew of the obstruction long before the accident. (T. 54).

Again the agreement gave the railroad full control of the track: Sections 4 and 8. (T. 8, 12). The track is broadly defined. (T. 6). Therefore, the railroad would have a right and a *duty* to remove dangerous obstructions irrespective of the ownership of such obstructions

just as it would on its main line. This track served several other industries and was used for general switching purposes. (T. 89, 105). At the time of the accident the railroad was serving one of these other industries as the agreement provided. (T. 90, 8). The spur track was therefore in effect part of the Southern Pacific system which in fact owned it. (T. 104). What would be allowable on the main line should therefore be allowable here especially since the agreement fails to provide for the removal of obstructions which it prohibits.

The railroad does not seek damages for breach of contract which would presumably be the cost of removing the obstruction but the amount for which it was held liable for its own tort, a failure to provide a safe place to work. The proper damages are those necessary to restore the track to the status quo, not those necessary to reimburse the railroad for its independent breach of duty to its employee. Not only were the damages caused by the railroad's independent negligence but they were not such as Booth-Kelly was legally obliged to envision as consequences of any alleged breach.

Any causal connection of an alleged breach of contract is broken by the long time intervening between the cart being left and the accident, and by the independent negligence of the train crew, particularly the con-

ductor, and the negligence of the injured man. Even if some negligence of industry concurred to produce the injury, to allow recovery as contract damages of the full amount of the railroad's tort liability would be unreasonable and would in effect defeat the well settled Oregon rule that contribution will not be enforced between tortfeasors. *Fidelity & Casualty Co. v. Chapman, supra.* Finally, since recovery is here sought for breach of contract and not indemnity, the expenses incurred in the Powers action are not a proper part of the damages caused by the breach of contract since quite apart from any contract the railroad would have been obliged to defend such an action against it as an employer under the Federal law.

ANSWER TO THE SOUTHERN PACIFIC'S SPECIFICATION OF ERROR NO. 2, POINT ONE

SUMMARY OF ARGUMENT

POINT ONE: The Southern Pacific relies on two indemnity sections in the spur track agreement: Section 18 and the second paragraph of Section 7; but only Section 7 is in point here.

POINT TWO: In the second paragraph of Section 7, there are two separate and distinct indemnity clauses and the Southern Pacific bases its argument only on the one relating to an act or omission of Booth-Kelly

and not on the one relating to joint and concurring negligence.

POINT THREE: An application of the principles of res judicata to Powers v. Southern Pacific Company shows that the railroad was held liable there only for its own act, a failure to warn, and not for any act or omission of Booth-Kelly as required by Section 7.

POINT FOUR: There is no ambiguity in the interpretation of the second paragraph of Section 7. But Southern Pacific Company v. Layman, an Oregon authority on interpretation of indemnity agreements, supports the contention of Booth-Kelly by its holding, while the dicta relied on by the railroad is not adverse to Booth-Kelly.

POINT FIVE: The Southern Pacific in its argument recognizes that the first judgment is res judicata against the parties here, and therefore its reliance on certain findings of fact as proximate cause is misplaced since the application of the doctrine of res judicata to the prior action makes those findings erroneous.

POINT SIX: The case of Astoria v. Astoria & Columbia R. Co., is not authority for Southern Pacific's claim for recovery under the spur track agreement.

ARGUMENT

The Southern Pacific here relies on two sections of its

spur track agreement dealing with indemnity: Section 7 and Section 18. (Brief 11). A reading of Section 18 shows that it is not in point here. It only extends to:

> "* * * all liability resulting from the movement of cars and/or operations by Industry upon said tracks." (T. 19).

The qualifying phrase "by Industry" modifies movement of cars. This is especially obvious when the phrase "upon said track," which follows the phrase "by Industry" is considered. The phrase "upon said track" must modify "movement of cars" since there is no other place on which they could move. To say that "by Industry," a small phrase sandwiched in between, does not refer to "movement of cars" is then particularly difficult. The phrase "by Industry on said track" is a unit which modifies both "movement of cars" and "operations," and the unit phrase has no application here since the accident occurred when the Southern Pacific and not Booth-Kelly was moving cars on the track.

The accident occurred on the part of the track shown by the solid red line on the blueprint attached to Exhibit 1. (T. 103-4). Paragraph 16 of the spur track agreement provides as to such track that industry may move cars itself in certain ways. (T. 18). The function of Section 18 then is to protect the railroad against such operations by industry.

Furthermore, both Section 18 and Section 16 were included in the same typewritten supplement to the contract and therefore were conceived together, and hence should be construed together. Section 19 is included in the same typewritten supplement immediately following the special indemnity section and helps to resolve any possible ambiguity in that section since it provides in effect that Industry may have to move cars itself on certain portions of the track. (T. 19). Therefore, Section 18 must be understood as removing liability from the Railroad for operations *by Industry* on the track and not for the Railroad's own operations.

The problem here is then the proper interpretation and application of Section 7, more exactly the second paragraph in Section 7. (T. 11). This second paragraph breaks down into two distinct parts: first: Industry agrees to hold the Railroad harmless for any act or omission of Industry; second, in case of any non-fire liability arising from the joint and concurring negligence of the two parties, such liability is to be borne equally.

Booth-Kelly contends that the second part of the indemnity paragraph making both parties equally liable for their joint and concurring negligence is the only part of Section 7 which may conceivably be in point.

But in its opening brief, Booth-Kelly has argued in detail that even this second clause as to joint negligence is not applicable here. (Brief 21-29). The Southern Pacific in its Specification of Error No. 2, takes an alternative position, arguing the court erred in failing to enter judgment for the appellant for $46,568.99, due to an act or omission of Booth-Kelly or in the alternative that judgment for $23,284.49 should have been entered as one-half the loss suffered by the railroad by reason of an act or omission of Booth-Kelly. (Brief 9). This last alternative is a hodge-podge. For, if an act or omission of Booth-Kelly caused damage, the railroad is entitled to recover all its loss, not just half. If it is entitled to recover only half, it must be guilty of joint and concurring negligence.

Although the Southern Pacific states two alternative specifications under Specification of Error No. 2, both based on an act or omission of Industry. Point Three of the Southern Pacific's specification of error in fact argues that the joint and concurring clause does not apply here. Since the Southern Pacific makes no argument that the joint clause is applicable, Booth-Kelly relies on the argument set out in detail in its opening brief, that the joint clause is not applicable here. (Brief 21-29).

The only language of Section 7 then, which may be

in point here, may be summarized as follows: The Railroad must be indemnified for loss caused by act or omission of Industry. But that part of Section 7 does not apply to the facts of this case. Booth-Kelly so argued in detail in its opening brief. (pp. 21-29). In summary form that argument is that the application of the principles of res judicata to *Powers v. Southern Pacific Company* shows that the railroad was held there *solely* for its failure to carry out its statutory duty as employer to warn its brakemen of unsafe working conditions, and not for any negligence in leaving the wood cart near the tracks which would be an act or omission of Booth-Kelly within the meaning of this clause. In short, the railroad can not claim indemnity for its own failure to warn since the clause requires an act or omission of Booth-Kelly. Booth-Kelly did leave the cart; but the railroad was not held for that act and therefore cannot demand indemnity for it.

Here the loss caused to the railroad was by its own act not by any act or omission of Booth-Kelly. It is immaterial that the wood cart was under the control of Booth-Kelly, a fact which may help to construe ambiguous language. Here the language is not ambiguous; it leaves no doubt that Booth-Kelly was to indemnify for only two things: (1) loss caused to the railroad by its own act or omission; and, (2) half of the liability caused by joint negligence. (This last as has been pointed, is

not argued here by the railroad and is hence excluded from consideration.)

Booth-Kelly, therefore, does not need to assert the undisputed law in Oregon that an indemnity provision will not be construed to cover losses caused by indemnitee's own negligence unless such intention is expressed in clear and unequivocal terms. *Southern Pacific Company v. Layman*, 173 Or. 273, 145 P. 2d 295.

Although the Southern Pacific recognizes that the general impact of the Layman decision, *supra*, is against its position, nevertheless it attempts to gain support from certain language of court at page 282. (Brief 16). A reading of the quotation and the case shows it is no comfort to the railroad. The quotation in effect states if the party contracting with the railroad has a duty his negligent failure to discharge that duty might be the primary cause of an accident. Here Booth-Kelly denies that it had a contractual duty to keep the track clear of wood carts for 42 inches; in short, the wood cart was not one of the prohibited obstructions to clearance. The argument as made in detail in the opening brief, (pp. 70-72) and will not be repeated here. Nor, as will be shown, was any act of Booth-Kelly the primary cause of the accident here.

Finally, other distinctions exist. The agreement subject matter there is different involving a crossing rather

than a spur track. The indemnity clause there was significantly broader than the clause here. Despite the much broader character of the indemnity clause there the court held that the Southern Pacific could not recover indemnity for payments made because of its sole negligence. Here the clause is clear, saying simply "act or omission of Industry," yet again the Southern Pacific seeks to recover thereunder for its sole negligence, a failure to warn.

The Southern Pacific relies on several Findings of Fact made by the court below; particularly reliance is on Finding of Fact 9 and 10, (Brief 12). Those two findings are specified as error in Booth-Kelly's opening brief at page 21. The argument there is based on res judicata; the contention is that if the principles of res judicata are applied to *Powers v. Southern Pacific Company*, it is now res judicata that the railroad's negligence was the immediate proximate cause of the accident and injury. The argument is developed in detail in Booth-Kelly's opening brief. (pp. 32-37).

Closely analogous cases on the facts are cited there to support Booth-Kelly's contention that the proximate cause of the accident was the railroad's failure to warn its employee. *Wm. Cameron & Co. v. Thompson*, Tex. Civ. App., 175 S. W. 2d 307, (unblocked hand truck); *Central of Georgia Ry. Co. v. Swift & Co.*, 23 Ga. App.

346, 98 S.E. 256, (unlighted shed near tracks); *Glappa v. Detroit, Etc., R. Co.*, 179 Mich. 76, 146 N.W. 134, (sand on track). Here the Southern Pacific is content with unsupported assertions that:

> "* * * Booth-Kelly's affirmative act of placing the cart and leaving it in position caused the accident." (Brief 13).

Or it assumes its case by asserting it was established that:

> "* * * Powers was injured by a wood cart which Booth-Kelly placed * * *" (Brief 12).

The very question at issue before this court is who as a legal matter caused this accident. Yet the Southern Pacific states as a conclusion that he was injured by a wood cart, as if that settles who was responsible for the injury.

The Southern Pacific asserts that its only fault was the constructive failure to do its duty imposed by statute. (Brief 12-13). Yet as has been explained in Booth-Kelly's opening brief: to switch on an obstructed track is itself negligent if the railroad employees know of the obstruction. (Brief 75). *Kanawha Railway v. Kerse*, 239 U.S. 576, 579, 36 S. Ct. 174, 60 L. Ed. 448. It is difficult to see that an error of omission is necessarily any less grave than an error of commission. But if that distinction is to be drawn and adopted, the railroad was

guilty of a positive error of commission when it operated on the obstructed track.

The Southern Pacific in its answering brief seems to adopt Booth-Kelly's contention as to the principles of res judicata. One of the main authorities for the proposition that the first judgment is conclusive on the parties to the second action is *Astoria v. Astoria & Columbia River R. Co.*, 67 Or. 538, 136 Pac. 645. The Southern Pacific cites that case and acknowledges that the scope of the estoppel by judgment in the primary case embraces all the issues determined by it, although the proposition is stated as related to only that case. (Brief 15). Since the railroad acknowledges the application of res judicata here, its reliance on findings of the court below is misplaced. Those findings are error because as authorities cited show the facts established in the first action determine that the railroad's negligence was the proximate cause of the accident.

The Astoria case, *supra*, is still relied on by Booth-Kelly but the pertinence of the authority to the case at bar is in regard to res judicata and estoppel, not as to substantive law of indemnity and negligence. Specifically, it is not as the Southern Pacific states:

> "* * * direct authority for Southern Pacific's claim for full recovery under the spur track agreement." (Brief 14).

Parenthetically it may be stated that the Astoria case, *supra*, does not justify recovery of costs and attorneys fees here because the carefully drawn contract here does not provide for such in its enumeration of coverage while in the Astoria case, *supra*, there was no such contract.

The Astoria case, *supra*, cannot be direct authority for recovery under the spur track agreement because in that case there was no express indemnity contract. The only "contract" there was an ordinance granting a franchise which merely required the railroad company to lay its track rails even with the grade of the elevated street and to keep the street crossing in good condition and repair. (pp. 543, 548).

The Court in the Astoria case, *supra*, concludes its analysis by stating that a non-observance of the ordinance provisions was proximate cause o fthe accident. (P. 548-9). In short, there the city as indemnitee was able by virtue of its municipal powers to delegate the duty of keeping the street crossing in repair. Here the indemnitee is the Southern Pacific and it cannot delegate its statutory duty to warn under the Federal Employer's Liability Act to Booth-Kelly. Here Booth-Kelly agrees that a non-observance of these provisions (employer's duty to warn) was the proximate cause of the accident.

Finally, the Southern Pacific quotes from the Oregon court's analysis of the Astoria case, *supra*, made in *Fidelity and Casualty Co. of N. Y. v. Chapman*, 167 Or. 661, 120 P. 2d 223 (Brief 15). That quotation is in part:

> "The City was held liable by reason of its failure to *enforce an ordinance* requiring the company to repair the defect." (Emphasis supplied)

Here the Southern Pacific in *Powers v. Southern Pacific Company*, was not held for any secondary liability, failure to enforce an ordinance, but for its own failure to meet a primary statutory obligation imposed on railroad employers by Federal law.

Even if the Astoria case, *supra*, is in point it affords no comfort to the railroad. In that case, the court's method of ascertaining whose negligence was active or passive is to analyze the complaint in the first action. (p. 547-8). Therefore the complaint in *Powers v. Southern Pacific Company* must be examined here. (Ex. 2a). Its effect is summarized in the Pre-Trial Order as follows:

> "The complaint alleged breach of Southern Pacific Company's statutory duty of using ordinary care to provide said Mack D. Powers with a reasonably safe place in which to work in that, first, it caused and permitted the wood cart to remain on the track, and second, it failed to warn him of the presence of the wood cart and the resultant insufficient clearance." (T. 34-5).

Thus it may be seen that the Southern Pacific was in fact charged with active negligence; a breach of its statutory duty to warn. The negligence, if any, of Booth-Kelly, merely was suffering a condition to exist upon which the active negligence of the railroad operated. Thus applying the test of the Astoria case, active or passive negligence, by the method of the Astoria case, analysis of the complaint in the first action, the conclusion reached is that here the railroad was guilty of active negligence.

Thus the general statements in the Astoria case on which the Southern Pacific is content to rest its case do not support its contention that Booth-Kelly is liable here by being actively negligent. Furthermore, the Astoria case is not so similar factually as authorities cited by Booth-Kelly in its opening brief and again here: Cameron case, *supra,* Central of Georgia case, *supra;* and, Glappa case, *supra.* These cases all deal with injuries caused by obstruction to spur tracks and not with a pedestrian falling from an unguarded apron leading up to a railroad track located in a city street. (The statement of the facts in the railroad's brief at page 14 is garbled.)

In its opening brief Booth-Kelly made these cases the basis of a detailed argument that the active cause of the accident was the Southern Pacific's failing to

warn its employee and in continuing operations on an obstructed track. *Kanawha Railway v. Kerse*, 239 U.S. 576, 579, 36 S. Ct. 174, 60 L. Ed. 448. (Brief 72-76; 32-35). Booth-Kelly relies on the arguments there advanced, but as a summary quotes from the Central of Georgia case, *supra*, which succinctly disposes of the Southern Pacific's contention that it was here guilty of only passive negligence. In that case the railroad had also failed to warn an employee of danger on a spur track and had continued to operate on the track despite its knowledge of the dangerous condition thereon. The court states:

> "The act of the railroad company in this voluntarily operating its train along said private track and under said shed, and in such undisproved negligent manner did not amount to *mere legal, passive acquiescence in the negligence of the oil company* in maintaining the shed in a dangerous condition, but *such active, positive and negligent conduct on the part of the railroad* itself amounted to an actual participation by it in the *proximate* cause of the homicide." (Emphasis supplied) (P. 256)

Parenthetically, it may be stated that Booth-Kelly relied on these four authorities in its opening brief. (pp. 32-34; 72-73). In its answer the Southern Pacific attempts to distinguish those cases. The distinctions attempted are faulty, but will be answered now to prevent any doubt as to the validity of the authorities above

cited. First, the Central case, *supra*, is distinguished by asserting that no indemnity contract was involved. (Brief 34, 50). At the places where the Southern Pacific attempts to distinguish that authority and also here the lack of an indemnity contract is immaterial since the authority is cited only on the question as to which of the parties was primarily negligent and not as to who contracted to bear the ultimate burden. The Southern Pacific seeks to disparage the case as an authority by saying no opinion was written. That is a quibble because as the official report shows, Jenkin, J. prepared a lengthy syllabus for the court in which he even cites a case.

The Cameron case, *supra*, is distinguished by Southern Pacific because no breach of contract is involved. The answer that has just made in conjunction with the Central case, *supra*, applies here. Second, it is said that there the hand truck was under the control of the railroad's employees. But there is no showing in the case that the train crew there had any more right to move the hand truck than they did the cart here. As for the truck being in the freight car, the car was presumably rented to the warehouse company since it had been hired to haul freight. The train crew had no business inside of the freight car there since any accident could have been avoided by shutting the car door. In short, the Southern Pacific

is attempting to draw a distinction between the inside of a rented freight car where the trainmen had no business, and the edge of a railroad right-of-way where the track was owned by railroad but the ground through which it ran was leased by the railroad to Booth-Kelly. (Blueprint attached to Ex. 1; T 103-4). There seems little distinction; in neither case did the trainmen have a right to move the cart or the hand cart. In both cases the trainmen, by simple precautions, could have avoided the accident: there, by closing the door, and here by requesting the cart moved.

Finally, the Glappa case, *supra*, is distinguished as merely involving the liability of the railroad to a teamster or merely the appeal of the injured person involved. (Brief 34, 50). The Kanawha Ry. case, *supra*, is also distinguished as involving merely the appeal against a recovery of the injured party. (Brief 50). That is admitted, but the reason these cases are cited here and in the opening brief (p. 34, 73) is that they analyze the negligence involved in similar fact situations. In the Glappa case, *supra*, it was urged as error that the evidence did not show negligence on the part of the defendant railroad. (p. 79). The court then points out that despite a third party's duty to remove the sand, that: "It was the alleged negligent movement of the cars over the accumulated sand which caused the injury." (P.

80). That is the point of the Glappa case, *supra*, for the case at bar. The Kanawha case, *supra*, shows that as a matter of law the Southern Pacific was actively negligent in knowingly continuing to operate on an obstructed track. It is immaterial that different type parties are involved here because that does not change the classification of certain acts or omissions as negligent.

To summarize, the cases relied on by Booth-Kelly not only are the most closely analogous factually but they are not distinguishable from the case at bar as to the points for which they are cited.

ANSWER TO THE SOUTHERN PACIFIC'S SPECIFICATION OF ERROR NO. 2, POINT TWO

SUMMARY OF ARGUMENT

Southern Pacific's contention that the Pre-trial Order is deficient in pleading certain elements of negligence is based upon an Oregon decision, but in the Federal courts, pleading is controlled by the Federal Rules of Civil Procedure. Federal decisions show that the Pre-Trial Order was an adequate pleading on this point; but in any case the Pre-Trial Order is adequate to meet the requirements of the state authority cited.

ARGUMENT

The Southern Pacific, without specifically so stating, contends that state law controls the determination of

this pleading point by citing *Fehely v. Senders*, 170, Or. 457, 135 P. 2d 283, without comment and by basing Point Two on its holding, but it is well established that:

> "The Federal Rules of Civil Procedure, 28 U.S. C.A. following Section 723c, govern pleading, practice, and procedure in the courts of the United States." Ettman v. Federal Life Ins. Co. 137 F. 2d 121, 127; Moore v. Illinois Central R. Co., 24 F. Supp. 731, 733, aff'd 312 U.S. 630, 85 L. Ed. 1089, 61 S. Ct. 754.

Rule 8 (f) provides that: "All pleadings shall be so construed as to do substantial justice." To that end the pleading should be viewed in the light most favorable to its drafter. *Ivaneik v. Wright Aeronautical Corporation*, 68 F. Supp. 270, 272.

But the Southern Pacific now contends that it was error for the court to reduce the recovery granted upon the basis of Finding of Fact No. 15 that: "Some elements of negligence on the part of the plaintiff concurred to cause the accident." (T. 54). That was error it is contended, because the Finding of Fact was not anticipated in the pleadings, that is, the Pre-Trial Order. It was not anticipated it is claimed because those elements of negligence of which the court found the plaintiff guilty were not specifically charged in the Pre-Trial Order.

But under the federal practice it was not necessary

to specify the precise elements of negligence, a general charge of negligence is sufficient. *Hardin v. Interstate Motor Freight System, Inc.*, 26 F. Supp. 97. In the cited case the court went even further and sustained a motion to strike allegations which were in the nature of specifications of negligence in addition to the general allegation of negligence.

Here there can be no question but that the general question of concurrent negligence was clearly and properly raised in the Pre-Trial Order. For example the following quotations are from the Issues of Fact:

> "4. Did the damage to Plaintiff's employee arise from the joint or concurring negligence of plaintiff and defendant?" (T. 45).
>
> "9. Is plaintiff barred from recovering under the track agreement by reason of its own acts and conduct?" (T. 46).

The same point is explicitly raised in the last sentence of C(4), Contentions of the Parties. (T 44) Finally the same point is raised in: Issue of Fact No. 7 (T 45); Contentions of the Parties A(3), T. 38; B(1), T. 40; C(2), T. 42.

But the Pre-Trial Order goes further and meets Southern Pacific's objection based on the non-applicable state case even more precisely. Contentions of the Parties C(3) states:

"That if it should become an issue under any of Plaintiff's contentions as to whether plaintiff's negligence caused the loss and injury to Mack D. Powers or whether plaintiff's negligence was a contributing cause of said injuries and loss, defendant then contends the railroad was negligent in the following particulars:"

(Then follow nine separate allegations of various states of fact constituting negligence) (T 42-43).

See also the following places where the Contentions of the Parties in the Pre-Trial Order, set out elements of Southern Pacific's negligence which Southern Pacific now contends was not alleged. (A (2), T 37; B (6), T 41; C (1), T 42).

So far it has been demonstrated that Finding of Fact No. 14 had a basis in pleadings or issues framed by the Pre-Trial Order. Even without the pleadings the course of the trial is adequate to show that the Southern Pacific had an opportunity to answer a charge of concurrent negligence. Rule 15 (b). Here in the course of the trial the precise elements of plaintiff's negligence were raised and considered and the Southern Pacific did not object. (See T. 61-62; 65-69; 72; 76-77; 112).

ANSWER TO THE SOUTHERN PACIFIC'S SPECIFICATION OF ERROR NO. 2, POINT THREE

SUMMARY OF ARGUMENT

POINT ONE: Booth-Kelly agrees that the language of the second clause in the indemnity provision relating to concurring negligence does not apply here, but for different reasons than those advanced by the Southern Pacific.

POINT TWO: Deep Vein Coal Co. v. Chicago & E. I. R. Co. is not authority for here refusing to apply the concurring negligence clause, and no authority is cited for refusing to give that clause its natural interpretation.

POINT THREE: The fact that Booth-Kelly was not primarily negligent prevents the application of the Deep Vein dicta in any case.

ARGUMENT

Booth-Kelly contends in its opening brief and still contends that the concurring negligence clause has no application to the case at bar. To that extent Booth-Kelly agrees with Point Three of the Southern Pacific's argument here, but reaches that conclusion by a different route.

First, an analysis of the wording of the clause shows

that it has no application here. The words are "joint or concurring negligence." The negligence of the parties here was obviously not joint negligence, nor was it concurring negligence. *Salt River Valley Water Users' Ass'n. v. Cornum*, 49 Ariz. 1, 4-10, 63 P. 2d 639.

In that case it was held that the negligence of a pole owner in leaving the end of a pole's guy wire projecting, was merely passive and innocuous when a guy wire end caught a pedestrian as he sought to escape the approach of a negligently operated automobile. The court states as page 10:

> "Further, it is practically universally held that where one negligence consists merely in creating and maintaining of a passive condition which is innocuous except through and by active negligence on part of a third person, the two are not concurrent. (Citations)."

Here, the proximity of the cart to the track like the hanging guy wire was innocuous except for the active negligence of the railroad in operating on the obstructed track and in failing to warn its employee of a dangerous working condition.

The second reason the concurring negligence clause is not applicable here, are the facts of this case as settled by the application of principles of res judicata to *Powers v. Southern Pacific Company*. In that case, recovery was had against the railroad for breach of its *sole* and *non-*

delegable duty to warn its employee of a dangerous working condition. In short, the Southern Pacific was held for an independent act of negligence, a failure to warn. The argument is set out in detail in Booth-Kelly's opening brief: pages 22-37; especially pages 26-28 and 31-32.

The third reason the concurring negligence clause is not applicable to the case at bar is that the clause is not sufficiently explicit under the Oregon law to cover the Southern Pacific's own sole negligence. *Southern Pacific Co. v. Layman*, 173 Or. 275, 145 P. 2d 295.

For these reasons the concurring negligence clause is not applicable to the case at bar; and as has been previously pointed out the act or omission clause is not applicable either. By arguing that the concurring negligence clause is not applicable the railroad concedes that its only indemnity clause basis of recovery is the act or omission clause. It thereby repudiates the basis of its recovery in the original action in the court below.

If this court should find that the concurring negligence clause is in point, no basis exists for giving the clause the restricted meaning contended for by the railroad. *Deep Vein Coal Co. v. Chicago E. I. R. Co.*, 71 F. 2d 963, holds only that where there was specific indemnity paragraph dealing with fixture obstructions that such paragraph controls when a pole obstruction

was involved. The paragraph in that case which is similar to Section 7 here was not involved, and statement relied on by the railroad is a gratuitous dicta.

The clause here says:

"* * * joint or concurring negligence of both parties * * *" (T. 12).

To say that this phrase does not cover the case where one party is primarily negligent is to rewrite the contract of the parties by importing restrictions not present in the language used by the parties. It is an unnecessary refinement not called for by the words used.

If this court were to find that the concurrent negligence clause is in point, and further that the Deep Vein case represents the proper interpretation of that clause, still there is no reason for not applying the clause. To apply the *Deep Vein* formula requires that the negligence of the railroad be consequent upon a primary negligence of Booth-Kelly. Therefore, the Southern Pacific must argue Booth-Kelly's negligence is primary.

Presumably, that argument is based on the Astoria case, *supra*. In answer to Point One under Southern Pacific's Specification of Error No. 2, it has been pointed out in great detail why that case does not demonstrate by analogy that the negligence of Booth-Kelly was primary. In addition as has been pointed out the fact that the indemnitee there was a municipality had an im-

portant effect in determining that the indemnitee's negligence in that case of secondary.

There is another reason still why Booth-Kelly's negligence here was not primary. *Leavitt v. Stamp*, 134 Or. 191, 293 P. 414, involved the question of a safe place to work. The court states at page 196:

> "In regard to an intervening, efficient, proximate cause, in such cases it may be stated that a prior and remote cause cannot be made the basis of an action for negligence, if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition, except because of the independent cause, such condition was not the proximate cause: 45 C. J. 931, § 491."

It is submitted that the facts here meet the requirements of the Oregon court. Here no danger existed except by reason of the independent cause, Southern Pacific's failure to warn. This is evident from the fact that trains had been switched in and out several occasions for over a week while the cart was near the track without anyone being injured. (Reporter's Transcript, *Powers v. Southern Pacific Company*, p. 20, 83-84; see opening brief p. 73-74). On this particular trip no one

else was hurt; it may be conjectured because all the other crew members knew of the cart's location. (Reporter's Transcript, *supra*, p. 283-4; 306). Second, *Wm. Cameron & Co. v. Thompson, Tex. Civ. App.*, 175 S.W. 2d 307, with like factual circumstances is specific authority for asserting that Booth-Kelly was not required to anticipate that the railroad would proceed to negligently switch on the obstructed track without warning its employee. (See also opening brief pp. 32-37). Finally, the whole question of proximate or primary cause is argued in detail in Booth-Kelly's opening brief. (pp. 72-77; 32-37).

ANSWER TO THE SOUTHERN PACIFIC'S SPECIFICATION OF ERROR NO. 2, POINT FOUR

SUMMARY OF ARGUMENT

Although the judgment in Powers v. Southern Pacific Company is res judicata in this action, the damages there are not conclusive of the proper amount, if any, of damages to be recovered here.

ARGUMENT

The damages assessed in *Powers v. Southern Pacific Company* are not *res judicata* between the present parties although the verdict and judgment there are res judicata as to negligence. As has been shown, Booth-

Kelly contends the prior judgment shows the Southern Pacific Company to have been held in the first action solely for an independent act of its own negligence. The damages levied there are then res judicata as to the parties there, but are not res judicata against this defendant under the facts of this litigation. Therefore, the court below did not err when it refused to be bound by the amount of the prior judgment or the figure at which it was compromised.

In the first place, it is well established that:

> "Issues not actually decided in the prior action are open." (citing many cases) Boston & M.R.R. v. T. Stuart & Son Co., 236 Mass. 98, 127 N.E. 532.

In certain cases, and this is one, the issue of damages is not decided insofar as the indemnitor is concerned.

Reporter headnote 3 of *Lord & Taylor v. Yale & Towne Mfg. Co.*, 230 N.Y. 132, 129 N.E. 346, states that if an indemnitee is obliged to defend the exclusive act of the indemnitor and the notified indemnitor fails to defend, the indemnitor is liable for the *damages* recovered *but:*

> "the rule is otherwise where the the original defendant has to defend against *some negligence of its own;* hence, a master who was negligent in inspection cannot, by calling in the manufacturer of the appliance which broke, shift the entire burden of such manufacturer." (emphasis supplied)

The annotation, 40 L.R.A. (N.S.) 1172, 1177, specifically covers the particular fact situation here:

> "If the plaintiff in the action for indemnity was held liable in the original action on the ground of some negligence of his own, and if the extent of his liability was determined within certain limits by the degree of his own culpability or of that of the present defendants, then it cannot be held that necessarily, and as a matter of law, the defendants in the action for indemnity are liable to reimburse the plaintiff therein to the extent of the judgment recovered in the original suit, even if the present defendants have been properly notified to come and defend that suit."

Authority for this assertion is found in *Consolidated Hand-Method Lasting Machine Co. v. Bradley*, 171 Mass. 127, 50 N.E. 464. (Pertinent quotation in Appendix I.) Since the damages were assessed with reference to the degree of culpability of the defendant therein, the amount of damages may be disputed when the first defendant sues for reimbursement. See also *Lowell v. Boston & Lowell Railroad Corp.* 23 Pick. (40 Mass.) 24, 35, cited by the Southern Pacific at page 21 of its brief.

Furthermore, it should be noted that the indemnity clause here does not in terms make any judgment rendered conclusive although the draftsman could easily have done so. Booth-Kelly merely agrees to indemnity

for "loss, damage, injury or death," not to accept the results of any litigation on such matters as conclusive of the proper amount of damages. In this aspect it is interesting to contrast the comparable clause in *Houston & T.C.R. Co. v. Diamond Press Brick Co.*, Tex. Civ. App., 188 S.W. 32. There the industry agreed to save the railroad harmless from any cause growing out of the operation of the spur track. Then the draftsman in a separate sentence provided that industry further agreed to reimburse the railroad for:

> "* * * any and all amounts it may be compelled to pay in settlement of any claim for which, under the terms of this agreement * * *," (industry would be liable).

Here the omission of any words making the payment or compromise of a judgment conclusive is significant.

In summary neither by law in view of the facts of this case, nor by contractual agreement were the damages assessed in *Powers v. Southern Pacific Company* res judicata as to the defendant in this case. Yet the Southern Pacific in each one of its three Specifications of Error assumes that the California action is *res judicata* of the amount of damages to be recovered either by indemnity, contribution, or as liquidated damages for breach of contract.

ANSWER TO THE SOUTHERN PACIFIC'S SPECIFICATION OF ERROR NO. 3

SUMMARY OF ARGUMENT

POINT ONE: The Southern Pacific seeks indemnity for the full amount of its loss plus its costs independently of the spur track agreement, but there is no other legal basis upon which a claim to indemnity can be based.

POINT TWO: Oregon authority, which is controlling, requires a contractual basis for recovery of indemnity; and the authorities cited by the Southern Pacific to sustain its claim for non-contractual indemnity all involve contracts.

POINT THREE: The rule of Lowell v. Lowell and Boston Railroad Corp., as to contribution or indemnity, is repudiated in Oregon.

POINT FOUR: The only new point raised by this specification of error is whether an indemnity liability independent of the spur track contract exists here, and an analysis of the authorities shows that no indemnity liability exists here because there is no implied contract for indemnity.

ARGUMENT

Under this specification of error the Southern Pacific contends that it can recover the full amount of its loss and costs independent of contract. Such a recovery

would have to be based either on a right of indemnity or of contribution. Indemnity is based on contract express or implied. *Vandiver & Co. v. Pollak*, 107 Ala. 547, 552-553, 19 So. 180. For other authorities see 20 Words and Phrases, "Indemnity," "Contribution distinguished," 681 and 1950 Pocket Part 196.

Here the Southern Pacific does not seek proportional reimbursement so it seems clear that its claim is not for contribution. Furthermore, in Oregon no contribution exists between two persons who acting independently or jointly have injured a third person although one may have discharged their joint liability. *Fidelity & Cas. Co. of N.Y. v. Chapman*, 167 Or. 661, 120 P. 2d 223. And under this specification the Southern Pacific does not question the court's finding of fact that the Southern Pacific was guilty of some negligence. (T. 54). It is clear that the Southern Pacific cannot recover by the principle of contribution since that is rejected in Oregon when two persons acting independently or jointly negligently injure a third person.

The reliance of the Southern Pacific must then be on a right of indemnity, but indemnity springs from contract. Here recovery upon the express contract is disavowed. The only basis of indemnity remaining would then be an implied contract, yet a contract cannot be implied to cover the same subject matter which

the parties have expressly contracted about in minute detail. *Failing v. Osborne*, 3 Or. 498.

The Southern Pacific seeks to meet this lack of a contract by citing *Lowell v. Boston & Lowell Railroad Corp.*, 23 Pick. (40 Mass.) 24. In that case it is said that there was no contract, yet there are good grounds for believing an implied-in-fact contract existed there: the town by its inaction accepted the promise of the railroad's agent to keep up the barrier. *Scott v. Curtis*, 195 N.Y. 424, cited by Southern Pacific, also involves an implied contract of indemnity where the express contract to sell coal was silent on the point.

To summarize the only Oregon authority, *Astoria v. Astoria Col. R. R. Co.*, 67 Or. 538, 136 Pac. 645, cited for a non-contractual indemnity recovery involves an implied contract of indemnity. The fact that the Astoria case, *supra*, is distinguished in the Fidelity case, *supra*, upon the grounds that a contractual relationship existed is significant in view of Fidelity case's sweeping condemnation of the principle of contribution, a word which the Oregon court sometimes extends to include indemnity. (Astoria case, *supra*, 546-7.) The inference is clear: if there is to be indemnity, there must be a contract in Oregon. The court below agreed when it concluded that Booth-Kelly was not obliged to pay anything independently of the spur track agreement. (Conclusion of Law No. 6, 55.)

That is the clear implication of the Oregon court's analysis of the Astoria decision in the Fidelity case, *supra*, which is recent, being decided in 1941. The Astoria case, itself, is subsequent to the two non-Oregon authorities relied on. The Astoria case is fatal to the Southern Pacific's claim to indemnity on a non-contractual basis. Here there can be no implied contract of indemnity because well established contract principles prevent the implication of an implied contract of indemnity where an express contract exists.

The quotation from the Lowell case, *supra*, set out in the Southern Pacific's brief at page 22 is also quoted in the *Astoria v. Astoria River R. Co.*, 67 Or. 538, 547, 136 Pac. 645, but the Southern Pacific omits one sentence which is quoted in the Astoria case:

> "In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt." (P. 547)

This sentence is important because it tags Massachusetts as the jurisdiction the Oregon court had in mind in Fidelity & Cas. case, *supra*, when it said:

> "In some jurisdictions where the offense is merely malum prohibitum and does not involve moral turpitude, it is not against the policy of the law to inquire into the relative delinquency of the parties and to administer justice between them although

> both parties are wrongdoers. Contribution, however, in our opinion, practically means adoption of the doctrine of comparative negligence. Certainly the allowance of contribution between active tort-feasors on any basis of comparative negligence is contrary to the well-established rule in this state." (P. 665)

The court in the Fidelity & Cas. case, *supra*, goes on to distinguish the Astoria case making it doubly certain that the court had the Lowell case in mind when it denounced contribution.

Furthermore, in the Lowell case in the paragraph immediately preceding the quotation used in the Southern Pacific's brief, (P. 22), the words indemnity or contribution are used interchangeably. (Lowell case, *supra*, P. 32.) As has been pointed out, the Oregon court in the Astoria case, *supra*, where it quotes the Lowell case, also uses the terms indemnity and contribution interchangeably. (P. 546-7). So the inference is that when the court clearly repudiates the Lowell case, *supra*, as authority on contribution that the condemnation extends over to indemnity which both courts had previously used the terms interchangeably. In any case as a minimum the law represented by the quotation from the Lowell case, *supra*, has been repudiated by the Oregon Court in the Fidelity case, *supra*. (P. 665).

The Fidelity case, *supra*, is the clearest and most recent authority in Oregon on a non-contractual recovery.

It distinguishes the Astoria case, *supra*, on ground that there was a contract there. One is lacking under this specification of error.

The other authorities cited by Southern Pacific, if they are in point at all, go no further than also to assert that indemnity may be allowed the one secondarily negligent as against the one primarily negligent. (Lowell case, *supra*, 32; Scott case, *supra*, 428). But those authorities are not close enough on the facts to establish which party here was primarily negligent. Thus the question here becomes: who was primarily negligent?

It has already been argued at great length in this and the opening brief that the negligence of Booth-Kelly is here only secondary or passive. Those arguments are here relied on and hence not repeated. The only new point raised by this specification of error is not whose negligence was primary but is there any rule of law allowing a recovery here except by virtue of the spur track agreement. The controlling Oregon authority, the Astoria case, *supra*, requires at least an implied contract of indemnity for a recovery for indemnity. There can be no such recovery here because there is no implied contract on which the Southern Pacific can rely after having disavowed reliance on the express contract.

REPLY BRIEF OF APPELLANT BOOTH-KELLY LUMBER COMPANY

(Appellant is referred to herein as "Booth-Kelly" and Appellee is referred to as "Southern Pacific" or "railroad.")

REPLY TO SOUTHERN PACIFIC'S ANSWER TO SPECIFICATION OF ERROR NO. 1

SUMMARY OF ARGUMENT

The determinations in Powers v. Southern Pacific Company are res judicata against the Southern Pacific here. Therefore, although it is true that formally the rights between Booth-Kelly and the Southern Pacific were not litigated in the Powers case, certain issues were litigated which effectively determine in this action that the Southern Pacific is not entitled to indemnity under its contract.

ARGUMENT

Although the question of the interparty rights between the Southern Pacific and Booth-Kelly are technically open in this action, the principles of res judciata, which bind both of the present parties, require conformance to the findings of the first action. An examination of the Powers case proceedings discloses that recovery was had there for certain failures of the Southern

Pacific which are not covered by its indemnity contract with Booth-Kelly. The question here is the applicability or non-applicability of the indemnity contract in the light of the facts found in the Powers case. Since the findings of the Powers case effectively prevent certain issues arising here, it was error for the court below to make Finding of Fact No. 18, and to enter Conclusion of Law No. 2. (T. 54, 55).

Conclusion of Law No. 2 states:

> "2. The determinations in the Mack D. Powers' action against plaintiff are not res judicata in this proceeding."

The Southern Pacific fails to dispute Point Two under this specification of error, which contends that the determinations in the first action are res judicata against the notified indemnitor. Therefore, in effect it is conceded that so far as Booth-Kelly is concerned the determinations in the Powers case are res judicata.

As to Point One of this specification of error relating to the indemnitee railroad, the Southern Pacific agrees:

> "* * * so far as indemnitee is concerned the scope of estoppel created by the judgment in the primary case embraces all of the issues determined by it." (Brief, 30).

Therefore, the inference is clear the Southern Pacific by its concessions, silent or express, agrees that the entry of Conclusion of Law No. 2 was erroneous.

That is sufficient to show that the court is in error, but despite these fatal concessions the Southern Pacific goes on to attempt to limit the authorities cited under Point One by Booth-Kelly by asserting that none of them go further than holding that the indemnitee cannot deny facts litigated in the first action. But this statement fails to make clear that those very facts may be a conclusive bar to the indemnitee's recovery. That is the significance of *Edinger & Co. v. S. W. Surety Ins. Co.*, 182 Ky. 340, 206 S. W. 465. (Booth-Kelly's Brief 12). The Southern Pacific attempts to distinguish this case by directing attention to irrelevant facts. The question here is the effect of the prior judgment on an indemnitee's claim against an indemnitor. The particular factual surroundings in which this principle is applied is here irrelevant, because the point is the scope of the controlling principle of law.

Part of the quotation made from the court's syllabus of *Central of Georgia Ry. Co. v. Macon Ry. & Light Co.*, 9 Ga. App. 628, 629, 71 S.E. 1076, shows how the generalization relied upon by the railroad must be understood:

"* * * the plaintiff in the second action is estopped

> from showing that the causes alleged in the prior action were not the true causes of the damages."

The railroad attempts to distinguish this case saying that no contract is involved. Here the question is what is the effect of the first judgment in the second action where a relationship of indemnity exists. The railroad now raises the irrelevant issue of how the relationship of indemnity arose.

The Southern Pacific makes the same fallacious distinction in respect to Comment (h) of Sec. 107, Restatement of the Law of Judgments, stating:

> "* * * the quotation cited was not meant to apply to a situation where a contract exists * * *"

This criticism seems to be hardly in good faith when railroad fails to mention that in the next sentence following the section quoted gives as an illustration, the case of a car driver who sues his insurance company on his policy for indemnity. The railroad also suggests that the Restatement does not apply where the primary negligence of the indemnitor caused the accident. No authority is given for that assertion, and a reading of the quotation suggests no reason why that should be so. It is stated simply that if a finding in the prior action would discharge the indemnitor, the principle of res judicata would require his discharge in the second

action. Finally the matter of attorney fees is here governed by contract, and the contract as drawn failed to provide for such.

The Southern Pacific analyzes *Hudson Valley Railway Co. v. Mechanicville E. L. & C. Co.*, 101 Misc. Rep. 152, 166 N. Y. S. 816, *reversed on other grounds*, 180 App. Div. 86, 167 N. Y. S. 428, and contends that it supports the Southern Pacific. The Southern Pacific's analysis relies on the opinion on appeal where the lower court's finding that the parties were in pari delicto was reversed. But the reason for citing the Hudson Valley case here is its ruling as to the conclusiveness of the original judgment in the second action as to the ground of liability in the first action. That authority is not questioned by the reversal on the contribution point.

Any possible conflict of the two Hudson Valley opinions as to the point now in question is resolved by the decision of the Court of Appeals in *Fulton County Gas & Electric Co. v. Hudson River Telephone Co.*, 200 N. Y. 287, 93 N. E. 1052, which is relied on in both opinions in the Hudson Valley case. (A lengthy quotation therefrom is set out in Appendix II.)

The quotation makes clear what was presented summarily in the Hudson Valley case; namely, the indemnitee is concluded as to the ground of its liability found by the verdict in the first action. The principle of res

judicata prevents assertion that the recovery was not based on the earlier ground. This earlier ground then in turn may be a fact fatal to the indemnitee's recovery over as it was here.

The railroad relies on *Astoria v. Astoria & Columbia River R. Co.*, 67 Or. 538, 136 Pac. 645, as a case analogous on the facts. Although the case is in point in certain respects, the examination of the *Astoria* complaint is not particularly helpful here in determining what party was primarily negligent. The reason it is not helpful here is that the facts are different. In the Astoria case a pedestrian was injured by a fall from a ramp leading to a track located in a public street.

REPLY TO SOUTHERN PACIFIC'S ANSWER TO SPECIFICATION OF ERROR NO. II

SUMMARY OF ARGUMENT

The fact that Powers recovered against the Southern Pacific only on the ground that the Southern Pacific failed to provide him with a safe place to work, is a fact fatal to Southern Pacific's recovery here. The determinations in the Powers action are controlling here because in this case they prevent the indemnity contract coming into operation. Booth-Kelly was not responsible for the Southern Pacific's failure to pro-

vide a safe place to work and could not be since the duty is non-delegable.

ARGUMENT

The Southern Pacific in its claim that the Powers case established only that the Southern Pacific failed to provide its employee with a safe place to work fails to note or to meet that the fact of Powers' recovery on that basis there is a fact fatal to its own recovery here. The railroad goes on to assert that Booth-Kelly was responsible for Southern Pacific's failure to provide a safe place to work. No finding of the court below to that effect is cited. Furthermore, to so argue is to ignore the undisputed fact that under the Federal law the duty to provide a safe place to work is non-delegable.

Booth-Kelly agrees that in a sense the ultimate responsibility as between the parties for the accident was not determined in the Powers case. This action, therefore, became necessary; but Booth-Kelly does assert and it is the crux of the matter that the facts litigated and determined in that case show that Southern Pacific is barred here. The Southern Pacific is barred here because the facts there determined show as a matter of law that the Southern Pacific was held for its *own act alone*—something which the indemnity contract does not cover. Since the previous adjudged facts show, as a matter of law, the cause of the loss, it was error for the

court below to redetermine the proximate cause, as it did in Finding of Fact No. 10. The fact that this wrongful redetermination resulted adversely to Booth-Kelly is the basis for asserting that error is prejudicial.

Actually, Booth-Kelly does not need to assert that the Southern Pacific's negligence was the sole negligence in that case. (Although it does so assert.) It is enough for it to assert that the recovery against the railroad was for the acts of the railroad alone. Since the recovery was for the acts of the railroad alone, neither of the indemnity categories were met. The Southern Pacific was not held in the Powers case for an act or omission of Booth-Kelly. The Southern Pacific was not held in the Powers case for the joint negligence of both parties. The Southern Pacific was held in the Powers case for its own act, a failure to provide its employee with a safe place to work.

The contention that Booth-Kelly might have been sued successfully by Powers, even if true, is immaterial here. In that case Powers would have had to recover from some negligence of Booth-Kelly. Here the Southern Pacific seeks indemnity for its own negligence.

Attempt is made by counsel to distinguish the authorities cited for the proposition that failure to warn is an independent act of negligence. The gist of the distinctions drawn is that in each of those cases the jury

found in the first action that the city (indemnitee) was guilty of some independent act of negligence, not covered by the contractor's bond. But that is one of the very reasons the cases were cited; here, too, the railroad was found guilty of an independent act of negligence which the indemnity contract (like the contractor's bonds) does not cover.

U. S. Fid. & Guar. Co. v. Thomlinson, 172 Or. 307, 324, 141 P. 2d 817, was cited to show the correct rule of construction where the indemnitee was solely negligent. Here examination of the proceedings in the Powers case show that the railroad was held for an act which it could alone have failed to do, failure to provide a safe place to work, so the case cited is in point.

Point Two of this Specification of Error points out that the court below erred when it found that certain alleged negligence of Booth-Kelly was the proximate cause of Powers' injury (Finding No. 10, T. 53). Such a finding was error as a matter of law, as certain closely analogous spur track cases show. (Opening brief: 32-34.) The Southern Pacific seeks to distinguish these cases; that the distinctions are fallacious has been pointed out in detail above. (pp. 23-6). The only Oregon authority suggested as in point is the *Astoria v. Astoria & Columbia River R. Co.*, 67 Or. 538, 136 Pac. 645, which is not close enough on the facts to be helpful in determining whose

negligence here was the proximate cause of negligence. Finally, the Southern Pacific makes no effort to avoid the effect of *Keller v. City of Fargo*, 49 N.D. 562, 192 N.W. 313, which shows by analogy that the judgment in the first action necessarily determines the negligence of the indemnitee was the proximate cause of the injury. (Brief 35-37). The issue of proximate cause was therefore res judicata, and the court below erred in making Finding of Fact No. 10 as a matter of law.

REPLY TO SOUTHERN PACIFIC'S ANSWER TO SPECIFICATION OF ERROR NO. III

SUMMARY OF ARGUMENT

Since Oregon statutes compel the construction of and operation on spur tracks by the railroad, the spur track agreement, specifically the indemnity section thereof, was without consideration as to Booth-Kelly since the railroad was obliged to serve Booth-Kelly as a matter of law and therefore could not impose conditions by contract.

ARGUMENT

The fact that the application of the Federal Employers' Liability Act to Powers' claim may establish that interstate commerce was involved, but there is no warrant for saying that *therefore* the requirements of

Federal law with regard to operations on private industrial spur tracks are applicable. Here the Southern Pacific is suing on a contract of indemnity. The question is consideration for that contract. That in turn becomes a question of what law controlled the negotiation of that contract.

Here the Federal government by statute has in effect delegated certain powers to the states. 49 U.S.C.A. sec. 1 (22) (set out at p. 38 of opening brief). Oregon has filled that gap by exercising its delegated powers, and as has been argued in detail in the opening brief, those Oregon statutes compel spur track service of the sort provided by the contract. (Brief 38-51). Therefore, the contract lacks consideration. On this the Oregon law controls, and it controls because the federal government has specifically left this matter to the states.

As has been pointed out earlier in this brief at pages 4-5, 49 U.S.C.A. sec. 1 (9), is not in point here because 49 U.S.C.A. sec. 1 (22) is controlling. Briefly, the distinction is that Section 1 (9) deals with a switch connection to existing track or track which may be required to be preexisting; Section 1 (22) deals with the construction of spur tracks wholly within one state.

The Southern Pacific relies strongly on *Luton Mining Co. v. Louisville & N. R. Co.*, 276 Ky. 321, 123 S. W. 2d 1055, which is not in point. Attention is directed to

a quotation made from that case by the Southern Pacific:

> "It is not required by law to perform the service. The *only* obligations imposed on it were by virtue of paragraph 9 of Section 1 of the Interstate Commerce Act, as amended, 49 U.S.C.A., sec. 1 (9) * * *" (Emphasis supplied.) (Brief 38).

It is evident that the Luton case, *supra*, is not in point here since there Section 1 (9) was deemed controlling. There the question was a switch connection; here it is a spur track wholly in one state. It is significant that the court distinguishes *Cleveland C.C. & St. L.R.R. v. U.S.*, 272 U.S. 404, 48 S. Ct. 189, 72 L. Ed. 338, which case as has been pointed out involved the application of Section 1 (22). It was therefore correct for the court in the Luton case, *supra*, to say that the only obligation imposed by law was by Section 1 (9) which leaves no room for the application of state law. Here Section 1 (22) is controlling, and under it the Oregon statutes impose an obligation.

The Luton case, *supra*, states that in that case there was consideration on account of the construction of the track. It relies on the case of *Gorman Coal Co. v. Louisville & N.R. Co.*, 213 Ky. 551, 281 S.W. 487, but in that case there were no Kentucky statutes compelling the construction of spur tracks as there are in Oregon. Sec-

ondly, the placing and removal of cars on such tracks is not consideration here because such service is also compelled by the Oregon statutes. These statutes are set out in the opening brief: 8 O.C.L.A. 113-108 and 109. (Brief 40-41) In addition 8 O.C.L.A. 113-129 (c) required the railroad to furnish cars. (Text in Appendix III) (Finally 8 O.C.L.A. 113-108, although similar to 49 U.S.C.A. 1 (9), is not identical on the important provisions here.)

No authority is cited for limiting 8 O.C.L.A. 113-104 to spurs on the railroad's own premises available to all shippers except *Southern Pacific Co. v. Railroad Com.*, 60 Or. 400, 119 Pac. 727. Nothing in that case so asserts and it does not appear that the spur there was to be put on the railroad's own premises. Also to be considered against this restrictive interpretation is the fact that railroads have the power of eminent domain to provide spur tracks necessary. (Railroad Com., *supra*, 414.) Finally, the tracks here were at least partly on property owned by the railroad, and the railroad served other shippers on the same spur as well as using the track for general switching purposes. (T. 89, 104, 105; see blueprint attached to Ex. 1.)

8 O.C.L.A. 113-109 is in point here. That section refers simply to a warehouse not to a public warehouse. As *State v. Wilson*, 47 N.H. 101, 106, shows the term is

broad enough to cover any building where a manufacturer's products such as cut lumber is stored awaiting shipment. (Quotation in Appendix IV) Second, an inspection of the scale drawing blue-print attached to Exhibit 1, will show that the Booth-Kelly mill buildings were less than 150 feet from the main line of the railroad.

REPLY TO THE SOUTHERN PACIFIC'S ANSWER TO SPECIFICATION OF ERROR NO. IV

SUMMARY OF ARGUMENT

The first sentence of Section 7 should be construed to modify the second and only other sentence since both sentences deal with indemnity. Since recovery was allowed on the contract in the court below, the question of the construction of that contract is material here, and the question was properly specified as error since it was specified that the court erred in allowing a recovery on the contract.

ARGUMENT

Testimony that the Southern Pacific was returning from delivering logs to Springfield Plywood Company at the time of the accident was uncontradicted. (T. 90). The court is asked to construe the contract here and ascertain if such a situation is covered by serving industry clause. That legal question of construction is open

because it has been specified as error that the court below allowed recovery *on the contract.* (Brief 53). The construction argued here and presented to the court below and inferentially rejected would bar recovery on the contract. (T. 112).

Counsel attempts to distort the question of serving industry into whether Booth-Kelly benefited from those operations. That is obviously a different question; here the question is the construction of the contract, and words are: "serving said Industry." The contract states that "Industry" is the Booth-Kelly Lumber Company. (T. 5). Service to the plywood company was not service to Booth-Kelly.

Even if it were a question of benefit there is no showing here that Booth-Kelly benefited. The following facts are to the contrary, and tend to show that the railroad benefited. An inspection of the blue-print attached to Exhibit 1 shows that the great bulk of the track was owned by the railroad. There was uncontradicted testimony that the Huntington Shingle Mill, one of the industries on the track, was located partly on Southern Pacific property. (T. 105). The fact other unloading facilities do not show upon the blue-print attached to Exhibit 1 is immaterial in view of the fact this particular contract concerned only Booth-Kelly and it would be expected that only Booth-Kelly's facilities

would be shown. Furthermore, it was specifically provided that the railroad might use the track to serve others than Booth-Kelly. (T. 8).

REPLY TO THE SOUTHERN PACIFIC'S ANSWER TO SPECIFICATION OF ERROR NO. V

SUMMARY OF ARGUMENT

The Oregon law as stated in Southern Pacific Company v. Layman is controlling, and it provides that an agreement to indemnify an indemnitee against its own negligence is void as contrary to public policy. The court below applied the concurring negligence clause, but this clause is void as contrary to the public policy stated. Even the general law would not consider the concurring negligence clause valid in view of the facts of this case.

ARGUMENT

As between the concurring negligence and the act or omission clauses, only the concurring negligence clause would allow indemnity to the railroad for its own negligence. The concurring negligence clause which splits any liability was in fact applied. This is conveniently summarized by the court in its decision:

> "However, since the railroad was in some measure also at fault which contributed to the accident, judgment is given under the contract for only one-half of the damage." (T. 117).

Although as appellee the railroad is presumably trying to uphold the judgment below, its argument here is based on the act or omission clause which the court did not apply.

Since the concurring negligence clause which was applied allows the railroad to be indemnified for its own negligence, it was error for the court below to apply that clause here since it was void under the Oregon law as stated in the Layman dicta. Under this specification of error, the Layman case, *supra*, has no other pertinence because it deals with the problem of the construction of an indemnity agreement. This dicta must prevail over any earlier dicta in *U.S.F. & G. Co. v. Thomlinson Co.*, 172 Or. 307, 325, 141 P. 2d 817, cited by the railroad, especially since the Layman dicta is a considered recognition of the weight of authority supported by citations while the Thomlinson dicta is a hypothetical aside in a discourse.

Although Oregon authority is controlling, the railroad relies on non-Oregon cases to support the validity of the contract here (Brief 47). None of those cases is in point here because they do not involve the construction of a concurring negligence clause as distinct from a blanket indemnity clause, and in only one of them is there a concurring clause like the one here. Finally none of the authorities relied on go further than to

state that a railroad may make such indemnity contracts when acting in a private capacity. They do not contradict the rule laid down by the United States Supreme Court:

> "It is the established doctrine of this court that common carriers can not secure immunity from liability for their negligence by any sort of stipulation. (citations)" *Railway Co. v. Grant Bros.*, 228 U.S. 177, 184, 33 S. Ct. 474, 57 L. Ed. 787.

Thus it is clear that if the Southern Pacific was acting in its capacity of common carrier it could not contract away its liability for negligence. Here the railroad was acting as a common carrier when it provided spur track service pursuant to 8 O.C.L.A. 113-104, 113-108, 113-109, 110 (The texts of the statutes and their general applicability are set out in the opening brief at pages 40-42 and 47-51).

Even if it was acting in its private capacity, there are certain exceptions to the rule that such indemnity contracts may be made which void the contract here. First, the rule does not extend to cases where the spur is used for purposes disconnected with the business of the industry. *William Danzer & Co. v. Western Md. Ry. Co.*, 164 Md. 448, 165 A. 463. There the sidings were being used as a storage and switching yard in a way which was disconnected with the business of the industrial plant. Here

the siding was also used for general switching purposes and to serve other industries. (T. 89, 105).

Second, the rule does not apply where the siding is located on the property of the railroad even though it was constructed at the request and for the benefit of a shipper who also paid part of the cost of construction. *Stoneboro & C. L. Ice Co. v. Lake Shore & M. S. R. Co.*, 238 Pa. 289, 86 A. 87. Here at least part of the track was located on land owned by the railroad. (T. 104; also see blue-print attached to Ex. 1.)

Counsel's attempt to distinguish the cases cited by Booth-Kelly at page 68 of its brief is faulty in two ways. First at least two of the cases do not involve public service companies or relationships: *Nashua Paper Co. v.* Noyes Buick Co., 93 N.H. 348, 41 A. 2d 920; *Jankele v. Texas Co.*, 88 Utah 325, 329, 54 P. 2d 425. Second, the services rendered by the Southern Pacific did not extend beyond those required by law as has already been pointed out.

REPLY TO THE SOUTHERN PACIFIC'S ANSWER TO SPECIFICATION OF ERROR NO. VI

The question here is not responsibility or the indemnity clauses but the step before that: causation attributible to any alleged breach. That was analyzed in the opening brief by the use of closely analogous cases on

the facts (pp. 72-76); counsel is content to rely on assertions as to cause unsupported by authority. Counsel's sole resource is an attempt to distinguish Booth-Kelly's spur track cases, but as has been shown earlier in this brief, the distinctions drawn are fallacious. (pp. 23-6). It is to be noted that the railroad makes no effort to meet the contentions of Booth-Kelly that the movement of cars here was negligent and to switch on an obstructed track is itself negligent as a matter of law. (Brief 73-76). Finally, in addition to the testimony of Witness Nysten (T. 99-102), Exhibit 15, railroad rules as to maintenance of way, shows the existence of the custom as to removal of obstructions and constitutes adequate proof of the custom. (Rule No. 1094; set out at p. 75 of opening brief.)

CONCLUSION

In conclusion, it is submitted for the reasons and authorities cited in this and the opening brief the cross-appeal should be dismissed and the judgment below reversed.

Respectfully submitted,

VEAZIE, POWERS & VEAZIE
and JAMES ARTHUR POWERS

APPENDIX I

In *Consolidated Hand-Method Lasting Machine Co. v. Bradly*, 171 Mass. 127, 50 N.E. 464, the court says at page 133:

> "We are also of opinion that the original action was such that by any form of notice the present defendants could not necessarily, as matter of law, be held bound by the judgment in that action. The damages in that action were assessed with reference to the degree of culpability of the defendant therein, or of some person for whose negligence the defendant was made liable by St. 1887, c. 270. The defendants in the present suit, if they are liable at all to the plaintiff, are liable at common law for breach of their contract or of their duty. The defendant in the original action was defending against its own negligence or the negligence of persons for whom it was responsible."

APPENDIX II

In *Fulton County Gas & Electric Co. v. Hudson River Telephone Co.*, 200 N.Y. 287, 93 N.E. 1052, the court states at page 1055:

> "The plaintiff must in this action accept the transaction in its entirety. The facts upon which the judgment in the Horning action was recovered are an essential and ineradicable part thereof, which the plaintiff may not deny, contradict, abandon, or supplant with other facts * * * If this defendant is by that judgment concluded on the question of Horning's damages and this plaintiff's liability, this plaintiff is concluded thereby as to the ground of its lia-

bility as found by the verdict of the jury and is not permitted to free itself from such verdict and the ground thereof, or reopen the issues litigated and adjudicated in the action in which the judgment was rendered. * * *

"Therefore, if it appears that the judgment in the Horning action was based upon a finding of fact fatal to recovery in this action, it cannot be maintained. The judgment in the Horning action is conclusive proof that the plaintiff in this action was legally liable to Horning upon the ground adjudicated in that action, if a ground were adjudicated, in the amount of the verdict therein. The record therein may disclose a state of facts showing that the defendant is or is not liable over to the plaintiff."

APPENDIX III

8 O.C.L.A. section 113-129(c) provides in part:
"(Failure to furnish cars: Demurrage and damages.) Any railroad neglecting or refusing suitable cars when applied for in conformity with the orders, rules and regulations prescribed by the commission (commissioner), and within the time therein stated, shall be held to be immediately indebted and liable to pay to such applicant a sum per day equal to the demurrage per diem charge which the commission (commissioner) may, by its order, have determined, * * * and in addition thereto all damages actually sustained by reason of the said car or cars not being so furnished."

APPENDIX IV

The court in *State v. Wilson*, 47 N.H. 101, 106, defines warehouse as follows:

> "A warehouse in the more limited sense is the building or place in which a warehouseman deposits the goods of others in the course of his business; and this limited construction was given to the word in Owen v. Boyle, 22 Me. 47. But in common discourse I understand the word is applied to buildings used for the temporary storage of merchandise before it is put into market for sale, or put in the course of transportation by sea or land to another place, though the buildings may not belong to a warehouseman but to the owners of the goods: such are the buildings in which manufacturers keep their goods for a time before they put them into market for sale or send them abroad it would seem to be the opinion of Bishop as cited by counsel, that the common and legal understanding of the term is the same; that in legal construction as well as in the common understanding of the word it would extend so as to include buildings of individuals or corporations where they store their own goods temporarily in distinction from the places where they are offered for sale or kept by the owners permanently till they are needed for use."